In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-444

PENN CENTRAL TRANSPORTATION COMPANY, THE NEW YORK AND HARLEM RAILROAD COMPANY, THE 51ST STREET REALTY CORPORATION, UGB PROPERTIES, INC.,
Appellants,

VS.

THE CITY OF NEW YORK, et al.,
Appellees.

On Appeal from the Court of Appeals of New York

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE
and
BRIEF AS AMICUS CURIAE IN SUPPORT OF APPELLANTS ON BEHALF OF PACIFIC LEGAL FOUNDATION

RONALD A. ZUMBRUN,
Pacific Legal Foundation,
455 Capitol Mall, Suite 465,
Sacramento, California 95814,
Telephone: (916) 444-0154,
Attorney for Amicus Curiae Pacific Legal Foundation.

DONALD M. PACH,
THOMAS E. HOOKANO,
Pacific Legal Foundation,
Of Counsel.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105
A BOWNE COMPANY

Subject Index

Table of Authorities Cited

Constitutions

Texts

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-444

PENN CENTRAL TRANSPORTATION COMPANY, THE NEW YORK AND HARLEM RAILROAD COMPANY, THE 51ST STREET REALTY CORPORATION, UGB PROPERTIES, INC.,
Appellants,

vs.

THE CITY OF NEW YORK, et al.,
Appellees.

On Appeal from the Court of Appeals of New York

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF APPELLANTS ON BEHALF OF PACIFIC LEGAL FOUNDATION

Pacific Legal Foundation requests permission to file an *amicus curiae* brief because it firmly believes that the decision of the Court of Appeals of New York reported at 42 N.Y.2d 324, 397 N.Y.S.2d 914, and 366 N.E.2d 1271 (1977), upholding the applica-

tion of the New York City Landmarks Preservation Law to appellant Penn Central Railroad's Grand Central Terminal without just compensation is contrary to the most fundamental constitutional concepts protecting the individual's right to own and use property.

The decision of the court below, substantially erodes the very underpinning of a property rights system in a free society which requires that compensation be provided an individual whose property has lost all reasonable use and productivity because of government regulations. The New York Court of Appeals, in an attempt to promote societal preferences for preservation of historic monuments, would qualify the right to compensation on principles never before recognized by this or any other court. The right to compensation would, among other things, be dependent on: (1) the economic status of the governmental regulator and its ability to pay; (2) the purpose of the regulation, be it for society's benefit or otherwise; and (3) the setting in which the property is located and its value apart from "society's" contributions.

Of grave concern to the Foundation is the fact that the decision of the New York Court of Appeals shifts the entire burden of preserving historic monuments for the good of society to the private property owner. Such burden not only violates the Fifth Amendment which guarantees that private property not be taken for a public use without just compensation, but violates basic concepts of equity and fairness. Extension and application of the New York

court's decision to situations beyond the preservation of historic monuments, the Foundation believes, is detrimental to the public interest.

It is with these concerns that Pacific Legal Foundation respectfully requests that it be permitted to address the issues posed by the decision of the New York Court of Appeals herein by filing the annexed brief *amicus curiae* so that the issues as they affect the private property owner, be he corporate or individual, may be fully and completely addressed.

Respectfully submitted,

RONALD A. ZUMBRUN,
Pacific Legal Foundation,
455 Capitol Mall, Suite 465,
Sacramento, California 95814,
Telephone: (916) 444-0154,
Attorney for Amicus Curiae
Pacific Legal Foundation.

DONALD M. PACH,
THOMAS E. HOOKANO,
Pacific Legal Foundation,
Of Counsel.

January, 1978.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-444

PENN CENTRAL TRANSPORTATION COMPANY, THE NEW YORK AND HARLEM RAILROAD COMPANY, THE 51ST STREET REALTY CORPORATION, UGB PROPERTIES, INC.,
Appellants,

VS.

THE CITY OF NEW YORK, et al.,
Appellees.

On Appeal from the Court of Appeals of New York

BRIEF AS AMICUS CURIAE IN SUPPORT OF APPELLANTS ON BEHALF OF PACIFIC LEGAL FOUNDATION

INTEREST OF AMICUS

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public interest.

Amicus is particularly concerned with the preservation of our free enterprise system and protection of private property.

The broad question before this Court is the measure of protection which the law affords to an individual against the oppressive and discriminatory exercise of the police power by way of regulatory action severely limiting the use of property. The specific regulatory activity brought into question in this proceeding is set forth in the facts as stated in the opinion of the court below. *Penn Central Transp. Co. v. City of New York,* 42 N.Y.2d 324 (1977). Those facts provide an account of appellant's attempt to make a reasonable use of its property and the substantial damage incurred as a result of a governmental decision to retain it in its nonprofitable form so that other citizens may benefit from its continued existence as a historic landmark. *Amicus* contends that where a land use regulation coupled with a purpose to enhance government resources singles out one property and becomes so burdensome to its owner as to be oppressive it should be viewed as confiscatory, arbitrary, and discriminatory.

Such regulation is not only contrary to basic principles of fairness, but it is most inefficient from a social and economic viewpoint in a free society.

In a broad sense, the damage wrought from excessive use of regulation is seen not only in terms of loss of property values to the individual directly affected, but also in economic dislocations to the community. Those dislocations include, for example, hardships on

the consumer who seeks housing in an overpriced and understocked market.

Under a system where an individual's property is subject to excessive governmental restrictions, ownership of land constitutes an exceedingly high risk. The increasing risks incident to property ownership have the potential to make investment in land less attractive, with the ultimate result of higher development costs and higher prices imposed by those who have assumed such risks. The risk is ultimately passed on to consumers whether it be the retailer seeking commercial space in a shopping center or the individual in search of affordable housing.

It is the interest of the public at large who must contend with market disequilibrium which *amicus* seeks to represent by way of its brief *amicus curiae.* Those interests are substantial.

It is the position of *amicus* that the appellants have proved a violation of a constitutional right guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution.

In analyzing the questions posed, *amicus* submits that fairness and considerations of public policy should guide the Court. *Amicus* urges the Court to shun any mechanical reliance on labels when considering whether compensation is indeed warranted by the regulatory elimination of all reasonable use of appellant's property.

Amicus urges this Court to recognize that the benefits of a governmental enterprise that are shared by

the community at large be paid by the community at large. The question of whether it is too costly for government to pay for its projects is no excuse for requiring such cost to be borne by a single property owner in contravention of its constitutional rights.

OPINION BELOW

The opinion of the New York Court of Appeals is reported at 42 N.Y.2d 324, 397 N.Y.S.2d 914, and 366 N.E.2d 1271 (1977).

ARGUMENT

I

INTRODUCTION

In the last fifty year this Court has rarely examined the constitutionality of a land use regulation in terms of a "taking" under the Fifth and Fourteenth Amendments. *Goldblatt v. Town of Hempstead,* 369 U.S. 590 (1962); *Nectow v. Cambridge,* 277 U.S. 183 (1928); *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922). It is for this reason that modern land use regulatory controls should be examined so as to provide guidance to government and landowners alike in their public and private planning.

Grand Central Station is the privately owned property of appellant Penn Central Transportation Company. It is not profitable or economically feasible to maintain or operate the station in its present form. Appellant desires to make economic and profitable use

of its property by developing the air space above its property for commercial use. However, the City of New York has prevented development so that the station and its site may be maintained in its present form as a historic monument. In spite of the fact that the property is privately owned, the city refuses to compensate appellant for its losses due to the regulatory limitation.

The trial court as finder of fact determined that all reasonable use of appellant's property has been denied by the regulatory activity. However, on the question of reasonableness, the highest court of New York added some additional "ingredients" to the formula for determining reasonableness and concluded that appellant under the new formula had failed to establish a taking of private property.

The new "ingredients" added by the New York court give rise to five issues:

1. Is society's contribution to the value of private property by virtue of its location in a community a factor in denying compensation to a property owner?

2. Is the economic status of the governmental agency a factor in denying compensation to a property owner?

3. Is the purpose of the land use regulation to preserve a historic monument a factor in denying compensation to a property owner?

4. Is the inclusion of the property owner's income from other real property assets a factor in denying compensation to a property owner?

5. Is the potential for receiving transferable development rights a factor in denying compensation to a property owner?

Amicus contends that each of the above factors was improperly applied by the New York Court of Appeals and that if such factors were applied uniformly to regulatory action of government, the whole concept of private property as we know it would be transformed into a form of socialized public ownership. It is this fundamental issue that makes this case take on a much greater significance than just the interests of appellants in this case.

Amicus will deal with each of the first three issues above and in order to avoid repetitive treatment joins in appellants' argument on the latter two.[1]

II

WHETHER OR NOT SOCIETY HAS CONTRIBUTED TO THE VALUE OF PRIVATE PROPERTY IS AN IMPERMISSIBLE BASIS FOR DENYING JUST COMPENSATION

The fundamental importance of property ownership as an incidence of our basic civil rights in society cannot be underestimated. This Court in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972), made it clear that:

[1]The decision of the court below is somewhat confusing on the issue of transferable development rights. It is difficult to determine whether or not the opinion deals with the subject on the issue of whether or not there has been a taking or whether transferable development rights are a means of compensating an owner once a taking has been established.

> "[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other."

The court below ruled that the attributes of ownership in Grand Central Station do not include the effects on value created by the efforts of society. This imponderable concept presents not only an appraisal nightmare, but it has no precedent in law. It is a sweeping emasculation of the most fundamental precepts of private property ownership. If this reasoning were applied to all private owners of property, it would indeed be difficult, if not impossible, to establish which part of the value of one's property belonged to the state and which part was his. Arguably, all of the value of one's property could be attributed to its setting in a community and therefore subject to total appropriation without compensation. Followed to a logical conclusion, private property, not unlike feudal tenure, would be subject to total governmental control far beyond that allowed by the Fifth Amendment of the Constitution. McClaughry, *Farmers, Freedom, and Feudalism: How to Avoid the Coming Serfdom*, 21 S.D. L. Rev. 486 (1976).

The court below in its restrictive approach to what constitutes private property has simply indicated to

appellants that Penn Central does not have a right in what society has contributed to the value of its property, and therefore, no compensation is justified for its loss.

While it is simple to examine this case in terms of whether there is a property right, such an approach begs the question. The question to be answered is: In the governmental control over the use of private property, has there been a violation of a *constitutional* right? The designation of a property right is usually determined *only after* a judicial analysis is made of *where* the economic loss should fall. *Southern California Edison Co. v. Bourgerie,* 9 Cal. 3d 169, 175 (1973). It is only after this determination that it can be said there is or is not a "taking" under the Constitution. Thus, to state that there has been a taking is no more than to state that compensation should be paid. As stated by Professor Arvo Van Alstyne:

> "Inverse condemnation epitomizes a struggle between the security of 'established economic interests' and 'the forces of social change' which cannot be rationally resolved by a mere search for definitions." Van Alstyne, *Statutory Modification of Inverse Condemnation: Scope of Legislative Power,* 19 Stan. L. Rev. 727, 735 (1967).

Even though the judicial conclusion in a particular case may be masked by discussions of "property right," the outcome (at least in cases of first impression) usually is based on a weighing of complex policy considerations—seldom disclosed by the court. *Bacich v. Board of Control,* 23 Cal. 2d 343, 350 (1943).

In *United States v. Willow River Power Co.,* 324 U.S. 499 (1945), Justice Jackson forthrightly recognized the actual issue stating:

> "But not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion. . . . We cannot start the process of decision by calling such a claim as we have here a 'property right'; *whether it is a property right is really the question to be answered.* Such economic uses are rights only when they are legally protected interests. . . ." (Citations omitted, emphasis added.)

More simply put by Justice Holmes:

> *"The question at bottom is upon whom the loss of the changes desired should fall. . . ." Pennsylvania Coal Co. v. Mahon,* 260 U.S. at 416 (emphasis added).

In dealing with the issues in this case, therefore, it must be remembered that the bottom line still is: Who should absorb the loss? By putting the problem in this perspective, we avoid the rationalization that it is legitimate to sacrifice the individual because he never had a "property right" in the first place. Whether he had a property right is ultimately the question to be decided by the Court. The real issue is under what circumstances can society legally justify asking individual property owners to absorb losses inherent in governmental programs designed to benefit many.

Amicus submits that the purpose of the regulation herein and the benefits conferred upon the community by virtue of the historical landmark designation are compelling reasons for distributing the costs of such benefits to the community.

III

THE ECONOMIC STATUS OF THE PUBLIC AGENCY IS IRRELEVANT TO THE DETERMINATION OF REASONABLENESS OF THE REGULATORY ACTIVITY

The court of appeals found that:

> "In times of easy affluence, preservation of historic landmarks through use of the eminent domain power might be desirable or even required." 366 N.E.2d 1271, 1278.

The court below is in effect saying that if government desires to make a public monument out of private property at substantial economic detriment, it should pay for the losses only if it can afford to do so. The court is saying that it is just to impose the cost of the public endeavor upon a single owner if society as a whole cannot afford to pay for it. This notion is not only contrary to basic ethics of fairness, it is unsupported by case law.

In *United States v. Fuller,* 409 U.S. 488, 490 (1973), this Court stated:

> "The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness . . . as it does from technical concepts of property law." *(See*

> *also* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,* 80 Harv. L. Rev. 1165 (1967)).

If there was any doubt as to where this Court stands on where the loss should fall, it was dispelled in *Armstrong v. United States,* 364 U.S. 40, 49 (1960), where this Court stated that:

> "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

It is clear that the economic status of the public agency is of no relevance to the issue of reasonableness of the taking.

In *Bacich,* 23 Cal. 2d at 350-51, the California Supreme Court considered a case wherein no property was physically taken and the only government action was to cul-de-sac a street. The court, in holding for compensation, analyzed the question as follows:

> "[F]ears have been expressed that compensation allowed too liberally will seriously impede, if not stop, beneficial public improvements because of the greatly increased cost. [Citations omitted.] However, it is said that in spite of that so-called policy 'the courts cannot ignore sound and settled principles of law safeguarding the rights and property of individuals. This (improvement) may be of great convenience to the public generally, but the properties of abutting owners ought not

> be sacrificed in order to secure it'; and, quoting from Sedgwick on Constitutional Law: 'The tendency under our system is too often to sacrifice the individual to the community; and it seems very difficult in reason to show why the State should not pay for property which it destroys or impairs the value, as well as for what it physically takes. . . .'"

If a public agency refuses to pay for a public project, that fact alone places in doubt the importance of such an undertaking as a priority in relation to other projects. To justify the taking without compensation on the basis of inability to pay is to do no more than to rationalize confiscation by converting into public ownership that which was private ownership. Such socialization of property is impermissible under our Constitution. This subject was succinctly put in focus in a California appellate decision, *Midway Cabinet etc. Mfg. v. County of San Joaquin,* 257 Cal. App. 2d 181, 192 (1967), where the court stated:

> "But in this context it has been stated by Professor Michelman *(op.cit.,* p. 1181); '[A]ny measure which society cannot afford or, putting it in another way, is unwilling to finance under conditions of full compensation, society cannot afford at all.'"

Putting it yet another way, one might ask whether we can afford a society which confiscates private property and allocates the loss disproportionately to the individual.

It is therefore submitted that the economic status of appellee should not have been a factor in reversing the trial court.

IV

THE PURPOSE OF THIS GOVERNMENTAL REGULATION IS FOR PUBLIC RESOURCE ENHANCEMENT AND FOR THIS REASON SHOULD BE VIEWED AS AN IMPERMISSIBLE TAKING

The court of appeals below appropriately noted the distinction between traditional zoning regulations where government acts in an arbitral capacity between competing land uses in a community and the type of regulatory control at issue in the instant case. The court noted that in traditional zoning, "each property owner in the zone is both benefited and restricted from exploitation, presumedly without discrimination except for permitted continuing non-conforming uses." 366 N.E.2d at 1274. Whereas, in this case "the burden of the limitation is borne by a single owner." 366 N.E.2d at 1274. One of the grounds upon which the court justified shifting the loss to the private citizen was the fact that the "purposes behind the regulation assume considerable significance." 366 N.E.2d at 1274. Indeed, the court noted that the "cultural, architectural, historical or social significance" (366 N.E.2d at 1275) attached to the parcel was an acceptable reason for singling Penn Central out for less favorable treatment than the victims of other types of discriminatory zoning.

The court below erroneously rationalized a denial of compensation upon the basis of the distinction be-

tween traditional zoning and the "acceptable" purpose of regulations to preserve historical landmarks. Indeed, it is this very distinction upon which compensation is constitutionally required.

While it is good for a community to preserve its historic heritage, the strong desirability of that goal is insufficient reason to shift the costs of implementation of such a governmental program to an individual property owner.

Professor Arvo Van Alstyne in an article, *Taking or Damaging by Police Power,* 44 So. Cal. L. Rev. 1 (1970), noted the distinction between the role of government acting in an arbitral capacity and that of an enterprise function when he stated that:

> "When the government steps out of its role as a neutral arbiter engaged principally in 'defining standards to reconcile differences among private interests in the community,' and instead acts in an enterprise capacity seeking the 'enhancement of its resource position, "the use of regulatory power is more readily seen by the judicial eye to constitute a compensable 'taking' than a non-compensable regulation."'"

(See also Sax, *Takings and the Police Power,* 74 Yale L.J. 36, 63 (1964).)

It is a well established principle in both federal and state courts that the costs of a public good should be distributed to those who will benefit. *Armstrong v. United States, supra; Holtz v. Superior Court,* 3 Cal. 3d 296, 303 (1970).

In a landmark California inverse condemnation case, Justice Traynor in *House v. Los Angeles County*

Flood Control Dist., 25 Cal. 2d 384 (1944), expressed the principle well when he stated at 396-97:

> "The decisive consideration is the effect of the public improvement on the property and whether the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking. It is irrelevant whether or not the injury to the property is accompanied by a corresponding benefit to the public purpose to which the improvement is dedicated, since the measure of liability is not the benefit derived from the property, but the loss to the owner."

It is, therefore, submitted that appellees' desire to establish a public monument out of private property is a project that cannot be achieved without cost. The allocation of that cost should be distributed to those that will benefit from the project.

Justice Holmes' famous admonition is as relevant today as when he stated it in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. at 416, that:

> "In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. [Citations omitted.] We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

Holmes' theory of the validity of police power exercise rests on strong considerations of the quantum of private economic damage and he has referred to its legitimate exercise as "the petty larceny of the police

power." 1 Holmes, *Laski Letters,* 457 Howe ed. (1953).

In the case of Grand Central Station, it is clear that the limits have been vastly exceeded.

CONCLUSION

Amicus respectfully submits that the trial court properly found a taking of appellant's property as a result of an unreasonable interference with its use. As such that ruling should be upheld and the decision of the New York Court of Appeals reversed.

RONALD A. ZUMBRUN,
Pacific Legal Foundation,
455 Capitol Mall, Suite 465,
Sacramento, California 95814,
Telephone: (916) 444-0154,
Attorney for Amicus Curiae
Pacific Legal Foundation.

DONALD M. PACH,
THOMAS E. HOOKANO,
Pacific Legal Foundation,
Of Counsel.

January, 1978.